

D. No Structural Barriers Exist to Continued Expansion in the Supply and Broadcast of Quality Children's Programming.

No reason exists to believe that any structural barriers exist to continued growth of the market for children's educational and informational programming. After the inevitable growing pains immediately following passage of the Act, the market, as noted above, has responded handsomely. If any imbedded structural barriers had existed, the market never would have expanded as it has.

No marketplace failure is apparent. As Commissioner Quello has stated:

Another argument being floated as a justification for an expanded government regulatory role in television is...the notion of "marketplace failure."

[T]his argument employs a rather strange notion of failure. For in the television marketplace, people are willing to pay to receive The Learning Channel, Discovery, Nickelodeon, Arts and Entertainment, the Disney Channel and other cable channels. Children's Television Workshop similarly has announced plans to form a new cable network. The 363 noncommercial educational broadcasting stations provide excellent children's programming and other general educational programming. let's not forget that probably hundreds of educational and informational children's programs are available on VCR tapes, which are a particular favorite of children because they can be played over and over. Finally, and perhaps most important, over a thousand commercial television stations and over 1600 low power stations are now available to meet specific local educational and informational needs.

This is not marketplace failure; it is the market at work. If consumers have the ability to access a great variety of programming sources but choose not to, this is *consumer* failure, not *market* failure.⁵³

⁵³Commissioner Quello's Remarks at 9; Geraldine Laybourne, President of Nickelodeon also debunked the market failure myth:

We have found at Nickelodeon that it is possible to make a business out of producing programs that are good for kids because, frankly, in the long run, it's good for business.

By serving our audience with programs that are high quality, we are able to strengthen our relationships with kids, parents, affiliates, advertisers, and other key constituencies. That may be against the conventional wisdom but we've formed an entire business based on bucking conventional wisdom.



Therefore, the Commission may have confidence that no structural impediments exist to the continued response of broadcast stations to the educational and informational needs of the children of their communities.⁵⁴

In sum, stations are fulfilling their vital role and responsibility in the video marketplace, and no reason exists to suggest that they will not continue to do so. Consequently, further action by the Commission at this point in time is much more likely to hinder than promote broadcast television's continuing efforts to provide and improve children's educational and informational programming.

E. A Review Of Industry Performance Should Be Set For A Date Certain In The Future.

The most productive role for the Commission now is vigilance. Whereas INTV does not suggest that broadcasters would be content to rest on their laurels, the Commission does bear a responsibility to Congress to assure that the current success of the Act is no flash in the pan.

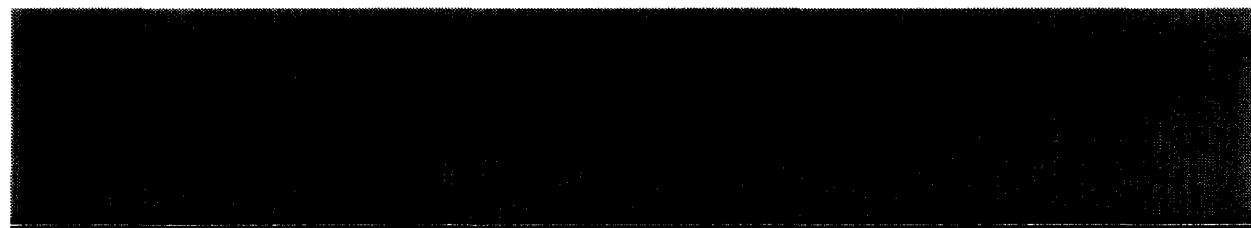
The most obvious mechanism for review of the industry's performance under the Act is the upcoming television license renewal cycle. During the course of the cycle, which begins in less than a year (October 1, 1996), the Commission will collect information on the children's

INTV, of course, recognizes that the economics of providing a cable program service, supported by subscriber revenues, as well as advertising, differs from the economics of broadcasting, which enjoys no such dual revenue stream. However, the expectations of the broadcast marketplace must be very different today than they were 20 years ago when the video marketplace and the broadcast marketplace were one in the same.

⁵⁴Attempts to show that such barriers exist lack credibility. INTV has debunked arguments purporting to demonstrate that the broadcast marketplace has failed to stimulate production and broadcast of quality educational and informational programming. See INTV 1994 Reply at 4-7.

programming practices of every television licensee.⁵⁵ For the first time, every station will have operated under the Act for the full term of their licenses. For the first time, the syndication market will have emerged from the difficult developmental phase which began with passage of the Act in 1991. For the first time, all stations will be more acutely aware of the nature and scope of their obligations under the Act (including the avoidance of program misclassifications, which, while less than widespread, created a misimpression that stations were careless or uncertain with respect to their obligations).

The Commission, therefore, could develop a sound record of industry performance, while leaving no doubt that broadcasters have a serious and ongoing obligation to broadcast programming responsive to the educational and informational needs of children. Moreover, it would avoid unnecessary and counterproductive actions which, while designed to spur compliance with the Act, most likely would sidetrack stations' efforts to provide programming which is exciting and attractive as well as educational.



INTV urges the Commission to resist the temptation to tamper with the now obviously successful implementation of the Act. The risks are greater than the rewards with respect to the variety of proposals to "reform" children's television. Major overhauls of the definition of so-called "core" programming are a case in point. Much highly beneficial programming could be shunted aside if the Commission were to exclude various program genres or confine stations to programming designed *primarily* to educate and inform.

⁵⁵The Commission has rejected review of licensee's ongoing efforts (including applications for assignment or transfer.) *91 R&O* at ¶36.



INTV, therefore, opposes consideration of all but the most limited modifications of the definition of "core" programming. In INTV's view, the definition should include specials, short-segment programming, and any programming which "furthers the child's intellectual/cognitive or social/emotional needs." The only sensible limitations might be provisos that (1) the station specifies the educational objective of the program in its children's programming report; (2) the program is aired between the hours of 6:00 a.m. and 11:00 p.m.; and/or (3) the program is identified as educational children's programming at the time it is aired and instructions for listing it as educational programming are provided by the licensee to program guides. No other circumscription of the definition ought be considered.

Narrow, rigid definitions are the enemy of creativity. Nothing could be more inimical to the successful fulfillment of Congress's vision than a confining definition that distills creative juices out of the production process. Unless children watch programs, the programs can have no benefit to them. Unless the creative spirit of the producer is fostered and encouraged, educational and informational programs will lack appeal -- and audiences. Children will watch something else which does entice them and excite their interests, regardless of its educational value or lack thereof. Unless stations are left to make programming and scheduling decisions based on their perceptions of what will draw the child audience in their markets, attempts to serve the educational and informational needs of children will be hollow and futile gestures.

INTV, therefore, must resist suggestions that creative programming and practices provoke exclusion from the definition of core programming. In particular attempts to exclude other than regularly scheduled, standard length programs from the definition must be resisted.⁵⁶

⁵⁶Indeed, in 1991, the Commission refused to require stations to air regularly scheduled children's programming. The Commission pointed out that:

Some licensees may, for example, believe that the needs of children in their community may best be met by children's program specials devoted, perhaps, to



Furthermore, the wisdom of Congress in broadly defining programming responsive to the educational and informational needs of children must not be insulted by embracing the false dichotomy between education and entertainment.

A. The Definition Of Core Programming Should Include Specials And Short-Segment Programming.

Exclusion of other than regularly scheduled programs of 15 minutes or longer duration defies common sense (as well as the evidence already before the Commission in this proceeding).⁵⁷

Short segment programming often is among the most effective and efficient means of conveying information to children. Short segment programming appears in popular entertainment programs which garner large audiences. Thus, more children are exposed to its educational and informational content. Margaret Loesch, president of the Fox Children's Network ("FCN") told the Commission:

Although the Commission has stressed the importance of long-form educational programming, our experience has been that attractive short-segment, interstitial material, embedded throughout the entertainment programming that we know children are watching, is a most compelling means of conveying information to our audience, perhaps more effective than standard length programming. Indeed, the standard program lengths were not designed to best take advantage of the developing cognitive abilities of young children. Rather, short segments, which grab children's attention immediately and hold it briefly, have been shown to be a much more effective didactic tool for the electronic media.⁵⁸

Brooke Sectorsky also emphasized this point in his testimony before Congress:

91 R&O at ¶20.

⁵⁷See Notice at ¶¶36, 42 *et seq.*

⁵⁸Oral Presentation of Margaret Loesch, president of Fox Children's Network, MM Docket No. 93-48 (June 28, 1994) at 5.



Short segment programming is especially effective at delivering specific educational and informational messages to children. When mixed with popular children's entertainment programs, the messages are likely to reach their intended audience. After all, advertisers have been using spot programs to inform audiences for years. There is no reason not to use similar techniques to inform and educate children.⁵⁹

Consequently, Mr. Spector's station broadcasts PSAs and other short segment programming directed at children:

We...air various public service announcement during our children's programming that are specifically designed for children. We have broadcast PSA's on forest fire prevention, seat belts, President's Council on Physical Fitness and the Partnership for a Drug Free America.⁶⁰

Thus, short segment programming is a particularly effective means of reaching a large child audience and conveying information in a form it is likely to be received and remembered.

Short segment programming also is an especially feasible vehicle for local television station production of high quality children's programming. Low production and opportunity costs permit stations to focus on quality. Again, Mr. Spector testified:

For many stations, short segment programming is directly related to local production. For example, we produce 30 second "Kidland" spots that are run six times a day -- three times in the morning and three times in the afternoon -- during our most popular children's programs. We have addressed such issues as the environment, school safety, recycling and phone friends -- an afternoon hot line for latch-key kids.⁶¹

WGN-TV's Peter Walker also described one of his station's use of short segment programming to educate and inform children:

[W]e did produce about 30 vignettes, 3 minutes in length, called Clown About Town, where went around to various locations in Chicago and...explained what these...areas meant. And, again, we did that because we believe that Bozo was...at

⁵⁹Spector at 11.

⁶⁰Spector at 11. Mr. Spector also noted that "The Fox network has been a leader in including interstitial messages in children's programming. These short segments have covered issues such as peer pressure, avoiding strangers, safety and the danger of drugs." *Id.* at 12.

⁶¹Spector at 11.

least through its larger audience...allowing us an opportunity to reach children even it was only for 3 minutes as opposed to 30.⁶²

Thus, short-segment and interstitial programming can be especially beneficial because it can be responsive to local educational and informational needs of children.

Exclusion of short segment programming would discourage its production and broadcast, thereby depriving children of some of the most beneficial educational and informational programming. Indeed, the Commission has refused to exclude such programming:

[W]e clarify that short segment programming, including vignettes and PSA's, may qualify as specifically designed educational and informational programming for children. Such material is well suited to children's short attention spans and can often be locally produced with acceptable production quality. It thus may be a particularly appropriate way for a local broadcaster to respond to specific children's concerns.⁶³

Special programs also can make a valuable contribution to the educational and informational needs of children. As shown by INTV's survey, specials (*i.e.*, programs which are not regularly scheduled) are part and parcel of stations' efforts to respond to the educational and informational needs of children.⁶⁴

The Commission has offered no sound basis for excluding special programming from the definition of core programming. Indeed, the Commission has recognized that, "Some licensees may, for example, believe that the needs of children in their community may best be met by

⁶²Tr. at 201-202. *See also* Comments of Tribune Broadcasting Company, MM Docket No. 93-48 (filed May 7, 1993) at 8 ("As the Commission has recognized, short-segment programming is cheaper for a station to produce. To the extent the Commission wants to encourage stations to make a commitment to local children's programming, vignettes, PSA's and other short program fare is the best entree. Short-segment programs can be repeated frequently for maximum impact, and are tailored to children's short attention spans.")

⁶³91 R&O at ¶25.

⁶⁴1995 Status Report at 14.



children's program specials devoted, perhaps, to particular topical issues."⁶⁵ The Commission, therefore, determined that licensees should not be required to broadcast regularly scheduled educational and informational programming for children.⁶⁶ Now the Commission frets that parents and their children might be unaware that such special programming has been scheduled.⁶⁷ This concern apparently rests on the unstated and incorrect assumption that specials must be last-minute additions to the schedule and, therefore, fail to appear in program guides and listings. This concern is unfounded. Stations include specials in their program listings.⁶⁸

Moreover, many extraordinarily beneficial programs would be excluded from full consideration. For example, station WSYT broadcast an hour long special, *Face the Hate*, which focused on racism and its causes. The station produced and broadcast a half hour prime time special called *Under the Anger: Racism Is More Than Skin Deep*. This special was directed at teenagers. A similar special, *Under the Anger: Youth Violence, Today's problem -- Tomorrow's Crisis*, also was produced and broadcast by the station.⁶⁹ Imagining more compelling programs for teenagers is difficult. Any definition of core programming which excluded such programs would define the term arbitrary!

⁶⁵91 R&O at ¶20, n.81.

⁶⁶*Id.*

⁶⁷Notice at ¶ 41.

⁶⁸News specials at times may escape listing simply because they involve events which occurred after listings were finalized, but this hardly is the case with respect to children's specials, which are produced or acquired and scheduled well in advance. In rare instances, such programs might be omitted due to unanticipated last minute schedule changes, but this is no reason to exclude the *genre* from the core program definition.

⁶⁹Cochran at 4-5.

In the case of both short-segment and special educational and informational programming for children, the Commission must appreciate that excluding them from the definition of core programming would invite their demise as valuable program genres for serving the educational and informational programming needs of children. To take actions which discourage production and broadcast of these highly effective programming types would transcend the arbitrary to the realm of irresponsible. A better example of the perils of heavy-handed government tinkering with the editorial and programming judgments of broadcaster television stations would be hard to find.

INTV, therefore, submits that neither short-segment nor special educational and informational programming for children ought be excluded from the definition of core programming.

**B. Core Programming Should Include Any Programming Which
"Furthers The Child's Intellectual/Cognitive Or Social/Emotional
Needs" Provided the Station Has Specified The Educational Objective
Of The Program in Its Children's Programming Report.**

Congress never intended to wrap the definition of children's educational and informational programming in a straitjacket. Senator Daniel Inouye, chairman of the Senate Subcommittee on Communication, who shepherded the bill to the Senate floor, emphasized in doing so that "a broad range of...programming" could satisfy the Act's programming requirements.⁷⁰ While acknowledging that the Commission rightly might expect each station to broadcast "some programming specifically designed for children to serve their educational and informational needs," he also pointed out that:

Educational and informational needs encompass not only intellectual development, but also the child's emotional and social development. Prosocial programming

⁷⁰136 CONG. REC. S 10121 (1990).

which assists children to discover more about themselves, their families, and the world would qualify.⁷¹

This, of course, is sound and sensible. As observed by Dr. Karen Hill-Scott, an educational consultant to a television network:

[F]or any of us who live in any major urban market in this country, we know developing competence, promoting inter-group tolerance and instilling basic human dignity are probably very important keys to salvaging our nation's future. We should not let cognitive content overrule the common sense dictum to educate the whole child.⁷²

The Commission, too, has acknowledged the unambiguous Congressional intent in this regard. It described the "open-minded perspective taken in the legislative history," calling it "a perspective consistent with allowing sufficient breadth of discretion for licensee creativity and sensitivity to community needs to develop."⁷³ Thus, the Commission also sidestepped the "de facto system of 'precensorship'" it had feared from the outset.⁷⁴

Now, the Commission again has been invited to constrict the definition to the narrow range of overtly educational programming. Such a departure from Congressional intent and prior Commission determinations would epitomize poor public policy. For example, proposals to limit the definition of core programming to programming "primarily designed" to educate or inform are based on a false dichotomy and would stifle production of creative educational and informational programming which might entice and excite children to watch them. As so eloquently stated by the Children's Television Workshop and acknowledged by program producers and consultants,

⁷¹136 CONG. REC. S 10122 (1990).

⁷²Tr. at 48.

⁷³91 R&O at ¶20.

⁷⁴*Id.* at ¶19.

programming must “reach” before it can “teach.”⁷⁵ This very practical reality was a premise of the Act. Programs like *Saved by the Bell*....were not designed primarily as educational, but such programs are remarkably effective in conveying valuable information to children.⁷⁶ As WSYT’s Linda Cochran testified before Congress:

Moreover, a government rule focusing on a program’s primary “intent” misses the point. Does it really matter whether the program’s purpose was to educate as opposed to entertain? The real issue is whether the program in fact educates, informs, and entertains. It is the final product that counts, not the *intent* of the program producer.⁷⁷

The irony of forcing television into a narrow educational mold was stated eloquently by Dr. Hill-Scott, an independent consultant:

Another issue on definition is the primary/secondary between education and entertainment. I think that is unequivocally a false dichotomy. Let us not forget that educators all over the country are desperately looking for ways to push the envelope of schooling so that we can reach disaffected learners, we can challenge brilliant kids and we can prepare a work force for the future. Pedantics alone are not the answer in the classroom and they’re not greatly effective on television either. We need to balance and integrate education and informational content within the entertainment vehicle. This is actually a more difficult goal than meeting a primary secondary form of relationship.⁷⁸

Forcing educational considerations to eclipse entertainment value is nothing short of foolish. As observed by Kenneth Werner, senior vice president of Business Affairs at Walt Disney Television:

We at Disney believe one of the reasons for our success is that we’ve always started with a creator. Does the program work creatively? Is it compelling, engaging, entertaining? If the answer is yes, then we know we might have something.

The Commission’s proposed rule flies directly in the face of that lesson, requiring the entertainment component, the entertainment value to be reduced to secondary importance. The result will be an inferior product that children will not watch. And the Commission will have foiled, however unwittingly, the objective of the Act.

⁷⁵See Tr. at 34.

⁷⁶S. Rep. No. 227, 101st CONG., 1st. Sess. 7-8 (1989).

⁷⁷Cochran at 16.

⁷⁸Tr. at 48-49.



The Act's goal was to have broadcasting assist and supplement the traditional educational process, not replace it. While children may be a captive audience of the school system, they are not when it comes to television. Outside of school children have enormous numbers of choices each day as to how they spend their free time. If the Commission adopts regulations that encourage educational programming that are anything short of fully entertaining and engaging, children will simply choose not to watch. So long as education is a significant purpose, this Commission should not try to regulate whether entertainment is primary or secondary.

Walt Disney once said, "We have long held that the normal gap between what is generally regarded as entertainment and what is defined as education represents an old and untenable viewpoint." We think Walt had it right.⁷⁹

Even Peggy Charren agrees with the legendary Mr. Disney:

[Y]ou shouldn't focus on how much of the program is educational and how much is entertainment.... You'll never get anywhere that way.⁸⁰

Peter Walker of WGN similarly pointed out the shortsightedness of forcing a retreat to overtly educational programming:

In the short run, if television stations are strait jacketed and forced by government fiat to broadcast unappealing, but educational programs, the audience will evaporate.⁸¹

Similarly, in the words of Jeanette Trias, president of ABC Television Children's Entertainment:

A program is not effective in teaching unless children are...attentive to what they are watching." Children pay more attention when their emotions are engaged by strong characters, good stories and the utilization of entertainment techniques such as music, sound effects and eye-catching graphics.⁸²

Thus, forcing programming produced for primary use on an advertiser-supported medium like broadcast television into a mold where its ability to draw an audience is a secondary consideration defies common sense. The Commission may or may not be able to require stations to broadcast the programming, but it can do nothing to assure that any child watches it. Putting aside the economic

⁷⁹Tr. at 44-45.

⁸⁰Tr. at 98.

⁸¹Walker at 6.

⁸²Tr. at 34.



consequences to the station, the program is of virtually no value if the audience is diminutive. Thus, in the long run, a constricted definition would be counterproductive from any perspective.

Congress recognized this when it passed the Act. Senator Wirth left no doubt about this:

Programming that is provided to fulfill this obligation can certainly be designed to be entertaining to children. Indeed, one might hope that this would be the case in order to maximize the attractiveness of such content to child viewers, thereby increasing its reach and impact on America's youth.⁸³

Thus, relegating entertainment to secondary status defies not only Congressional intent, but, more to the point, common sense.

Furthermore, the "primary purpose" test is no less subjective than the current definition. Indeed, it likely is more so. Broadcasters, who must apply the definition, rightly fear uncertainty and the resultant threat of equally subjective second-guessing by even a well-intended government agency. ABC's Ms. Trias testified:

To my way of thinking, the specifically designed test is a much more objective standard than is the primary purpose test. It can be enforced by the Commission without second guessing broadcaster program judgments. On the other hand, the primary purpose standard would be entirely subjective. The Commission would find itself screening programs to decide whether the educational content is enough to make it primary or whether the entertainment component is too significant.⁸⁴

No chorus of television station licensees' lifting a refrain of that popular cry of the 60s -- "void for vagueness" -- has been heard. Fox's Margaret Loesch testified:

I just want to point out that under the current guidelines that this Commission has set we have developed broadcast programs that are excellent such as *Sesame Street* and *Bill Nye* and *Carmen Sandiego* and -- *Driver*. And think that those of us in broadcasting improving our stations are very clear on what is educational and what isn't.

I also want to point out that the stations that utilize the *Jetson[sic]* as a -- program were very few. There were only a couple of rotten apples. And they were.

⁸³136 CONG. REC. S 10126 (1990).

⁸⁴Tr. at 36.



It's preposterous that they used that. But I think the vast majority of us clearly know what is educational. And we utilize, actually using the definition or the significant purpose of when we were developing *Carmen Sandiego*. So, we find the current definition very compelling.⁸⁵

Stations now know what educational and informational programming for children is, and in case they still "don't get it," INTV refers them to the testimony of Peggy Charren, who said, "I have in here a definition from the FCC Policy Statement in case the broadcasters need to know what education is. It was good then and it's still good."⁸⁶

When all is said and done, the concepts must merge rather than diverge. WGN's Peter Walker hit the nail on the head when he observed that "The key is to educate and entertain at the same time. They are not mutually exclusive concepts."⁸⁷

Therefore, the Commission should remain assiduously faithful to its statutory mandate and maintain its present flexible definition of core programming.

Only in the face of the most compelling evidence should the Commission even make slight modifications to the definition. Those slight modifications could include the modest provisos that would be consistent with the basic goal of providing educational and children's programming that children will watch. INTV acknowledges that limiting core programming to the 6 a.m. to 11 p.m. period would further that goal. Broadcasting children's programming when the vast majority of children are sleeping offers little benefit to anyone. Similarly, limiting core programming to programming identified as such by the station at the time of broadcast and in instructions to

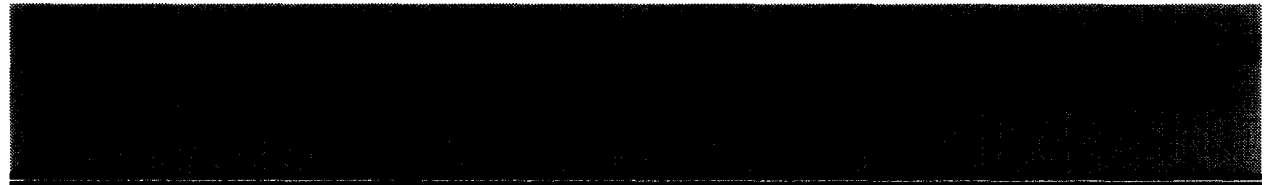
⁸⁵TR. at 87.

⁸⁶Tr. at 98.

⁸⁷Walker at 6.

program guides might serve to promote the program to parents who wish to steer their children's viewing toward those programs. Again, audience may be enhanced.⁸⁸

These modest changes in the definition of core programming rest on the edge of rational decision making. INTV proffers them only as ideas which the Commission might adopt in the face of compelling circumstances. INTV continues to view flexibility as the key to the best practicable service to children and sees no need to tamper with a regulatory regime which has succeeded in every material respect.



INTV submits that no sound basis exists for intrusion into licensee's programming decisions. Nonetheless, INTV recognizes that good intentions can drive regulatory decisions beyond the bounds of reason and common sense. Indeed, the Commission is being pressed to insert itself deeply into broadcast editorial processes. INTV, therefore, does offer comments on the several proposals in the Commission's *Notice* in the hope of reforming them, attenuating their intrusion into licensee discretion, and minimizing their undesirable effects.

The thrust of INTV's position is preserving as much room as possible for creative and responsive educational and informational programming for children. Flexibility remains the key. Thus, INTV offers an idea which provides some additional guidance to stations and underscores the Commission's objectives, but falls short of rigid requirements which force sameness and mediocrity.

⁸⁸INTV, however, does remain somewhat leery of on-air logos and announcements indicating that programs are educational or informational in nature. This might actually discourage viewing when children rather than parents exercise the prerogatives accorded by possession of the remote control.



The Commission might issue a policy statement, which would include two elements. First, the Commission would delineate policies and practices which stations might adopt in their efforts to serve the children of their communities. Stations would not be *required* to adopt or implement any of the listed policies or practices. However, the adoption and implementation of such policies and practices would be considered in the Commission's review of the station's license renewal application. Second, the policy statement would enunciate a "safe harbor" policy, whereby stations which provided a set amount of "core" educational and informational programming for children would be considered in compliance with the programming obligations of the Act.⁸⁹ The policy statement would emphasize that stations *just as easily* could demonstrate compliance with the Act via other combinations of programming, policies, or practices responsive to the educational and informational programming needs of children. Again, such station policies and practices also would be described in the policy statement.

Whereas INTV offers no endorsement of such an approach, it remains preferable in every respect to the more draconian proposals to establish the Commission as the federal program director for local broadcast television stations.

⁸⁹As INTV stated previously in this proceeding:

Such a safe harbor policy would differ markedly from rules. Rules setting forth specific quantity, type, and time requirements with respect to educational and informational programming for children would eliminate licensee discretion completely and strait jacket station efforts to be creative or responsive to change in the marketplace.

Rules also lock the Commission into a regulatory program which can be expected to outlive its usefulness. The problem faced today by the Commission appears to be temporary, a function of normal lag time in program development, production, and distribution.

INTV 1993 Comments at 9. Indeed, the continued improvement in the availability of educational and informational programming for children confirms that rules already would have outlived their usefulness.



A. The Policy Statement Could Describe Station Policies And Practices Which The Commission Would Consider Creditable.

The record in this proceeding is laced with numerous suggestions and proposals for improving children's television. Many of them involve practices or policies which stations might employ in their efforts to comply with the Act. INTV sees no need to enshrine these various proposals as rules. However, if the Commission considers additional action necessary, it could indicate that it would view such policies and practices favorably in reviewing television stations' license renewal applications. As noted by Dr. Hill-Scott, "What needs to be done at this point is to generate guidelines which might reiterate the intent of the Act and illustrate ways broadcasters can meet the Act ..." ⁹⁰ This would allow stations to adopt such practices voluntarily in accordance with the needs of their communities and the nature of their children's programming service. In no sense, however, does or would INTV endorse these proposals as requirements.

Among the practices which might gain the Commission's approval are the following: ⁹¹

- Identification of educational and informational programming for children at the time of broadcast via an announcement, "billboard," or icon. ⁹²

⁹⁰Tr. at 51.

⁹¹For each item listed, INTV has noted portions of the record which describe the benefits and/or costs of such a practice or policy.

⁹²*Notice* at ¶ 24; *see also* Tr. at 61 (Testimony of Catherine Belter, National PTA Vice President for Legislative Activity, suggesting that "The requirement on the part of broadcasters to provide better information to the public about the programming efforts that they are embarking on should include possibly a symbol on the T.V. screen that will assist parents in identifying programs that are especially designed for children."); *see also* Tr. at 92-93 (Testimony of Dr. Dale Kunkel, stating, "My key proposal that I think will increase both the quality and quantity of educational programming that the broadcast industry provides is to ask the broadcasters to identify at the time a program is aired the programming that it claims as fulfilling the Children's Television Act. The public is supposed to play a role in this process. If you make that information available to the public, then I think that gives them an opportunity to make the public the arbiter of what's good enough or how much is enough rather than the Commission."); *but see* Tr. at 86-87 (Testimony of Margaret Loesch, stating, "And I suspect that if you put anything on the air that signify school and

- Notations or other designations in program listings supplied to publishers of program guides that a program is an educational and/or informational program for children.⁹³
- Use of consultants in the fields of education and child development.⁹⁴
- Consistent scheduling and non-preemption policies with respect to educational and informational programming for children.⁹⁵
- Joint ventures with and assistance to public television stations.⁹⁶
- Provision of ancillary materials such as study guides, scripts, bibliographies available to educators.⁹⁷

homes, the children are going to turn off the set, watch, watch another program.”)

⁹³*But see* Tr. at 86-87 (Testimony of Margaret Loesch, stating, “Well I think program listings is probably confined to parents. Children don’t look at program listings.”)

⁹⁴Tr. at 86 (Testimony of David Britt, President and CEO of the Children’s Television Workshop, stating, “Well, we find in our own work that very frequently local elementary school teachers, local community college professors, local psychologists and child development specialists would be very happy which is very effective to work with local broadcasters on developing programs. In fact, as I understand this, it’s now being done by a lot of local broadcasters. This does not have to be a very expensive and elaborate process.”)

⁹⁵*See* Tr. at 108 (Testimony of Charlene Uhl, Campaign Director for Maryland Campaign for Kid’s T.V., recommending, “That [educational and informational programming for children] is aired at times when children are likely to watch and it’s maintained in a regular time slot. Parents found over and over again in trying to guide their children’s viewing habits, they couldn’t count on those programs being in the same time. They were often pre-empted.”); INTV takes no position on the accuracy of Ms. Uhl’s claims, but cites her testimony to confirm that regular scheduling is a credit worthy practice (albeit no prerequisite of credit).

⁹⁶*See* Tr. at 197 (Testimony of Sheila Tate, stating, “I think that if enlightened self-interest brings commercial broadcasters to the conclusion that, that there are partnerships with us that make sense, we would be delighted to talk about them. I -- the initiative, I did not get a chance to describe to you, is precisely the kind of initiative that we would love to undertake with our colleagues on the commercial side. And it doesn’t have to be money. It can be - contributions, it can be simultaneous programming. It can be all sorts of services. And I think with the changing broadcasting circumstances and conditions, we ought to be open and look to all sorts of opportunities to do that.”); *see also* 91R&O; Notice at ¶¶77-85; *but see* Tr. at 136 (Testimony of Paul La Camera, stating, “One, first and foremost, broadcasters aren’t asking to be relieved of their obligations to the children in their audience and I think that’s very important. And, secondly, those resources that are available to us, we would obviously feel are best directed to the services that we provide our local news, our local programming, special efforts, community outreach, everything that makes television stations in this country the unique contributing institutions that they are.”)

⁹⁷*See* Tr. at 154.



- Reasonable access to programs and related materials via new delivery mechanisms (*e.g.*, the Internet and the various online service providers).⁹⁸
- Formalized ascertainment procedures and children's advisory boards.⁹⁹
- Offering videos of educational and informational programming for children.¹⁰⁰
- Facilitating access to station records describing children's programming.¹⁰¹

Stations might adopt any of these practices, but none would be required to do so. They could be used selectively according to the station's evaluation of local needs.

Stations properly should be credited with adoption of these policies and practices. The consideration of such station policies and practices is fully consistent with the Act. Each of the policies described above would "enhance the educational and informational value" of its educational and informational programming for children.¹⁰² Again, many are the sorts of practices which promote viewing, an essential element of any effective effort to educate and inform children via broadcast television.

⁹⁸*Id.* at 154-155; *see also* Walker at 3 ("In fact, the show [*Energy Express*] had its own feature "bulletin board" on the "America Online" service that permitted viewers to contact the producers and ask questions about the program.").

⁹⁹*Id.*

¹⁰⁰Statement of Karen Jaffe before the *En Banc* Hearing on Children's Television (June 28, 1994) at 13 ("KIDSNET has found that educators and parents who can obtain a show they like *after* broadcast are more likely to watch the program in the first place.").

¹⁰¹*See* Testimony of Dale Kunkel, Ph.D., FCC *En Banc* Hearing on Children's Television (June 28, 1994) at 9 ("Under existing policy, how is a parent or interested individual in the community able to learn what a given licensee is doing to fulfill its obligation to children? That individual would be expected to visit the station in question and to consult the licensee's public file, which should contain a brief summary of its children's programming efforts that is updated at least quarterly. It is no secret that few parents have the time in their busy schedules to pursue such efforts. Indeed, it has been my experience that almost no one in the lay public even knows what a station's "public file" is, much less why one might wish to review it.").

¹⁰²47 U.S.C. §303b(b)(1); *Notice* at ¶78 *et seq.*; 91 *R&O* at ¶28.

B. The Policy Statement Might Establish A "Safe Harbor" Policy Under Which Stations Which Broadcast Two Hours Of "Core" Programming Per Week Or Four Hours Of "Core" And Non-Core Programming Per Week Are Considered To Have Complied With The Act's Programming Requirements.

INTV previously has suggested adoption of a quantitative "safe harbor" policy with respect to educational and informational children's programming. INTV then believed that the benefits of the "safe harbor" might outweigh the costs. Now, however, INTV no longer considers a "safe harbor" with respect to the children's programming obligation necessary or particularly beneficial. The performance of the broadcast industry has demonstrated the industry's commitment to the Act. A "safe harbor" policy, therefore, now is unwarranted.

Nonetheless, the Commission has requested comment on various proposals which would quantify a station's obligation under the Act.¹⁰³ INTV, therefore, offers its alternative idea of a flexible policy, one element of which might be a "safe harbor" defined by meeting a quantitative test.

INTV previously has described the benefits of a policy statement in lieu of a rule or processing guideline.¹⁰⁴ In light of the well-known risks associated with quantitative measures of compliance, which INTV also has stated to the Commission that more flexible approach embodied in a policy statement must be considered at the farthest boundary of sound decision making.¹⁰⁵

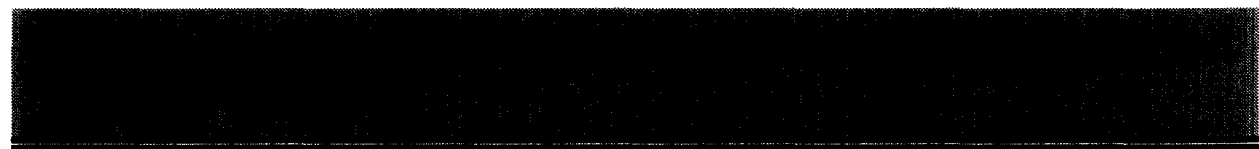
¹⁰³*Notice* at ¶¶56-61.

¹⁰⁴INTV 1993 Comments at 8-9.

¹⁰⁵*Id.*

INTV would define the “safe harbor” as two hours of core programming per week (based on the definition of core programming suggested by INTV, *supra*) or four hours of core and non-core educational and informational children’s programming per week.¹⁰⁶ A higher threshold would pose too great a risk of elevating quantity over quality. Again, quality programming will attract child viewers and stand some chance of educating or informing them.

A policy statement would strap neither the Commission nor its licensees to pre-ordained results. Local flexibility to fashion programming and policies to respond to local needs and interests would be maintained. At the same time, Commission efforts to provide encouragement and guidance would be more likely to remain just that, rather than governmental insistence that all stations serve the needs of children in the same, likely mediocre way.



INTV has offered ideas which properly might be elevated to serious proposals if the record establishes widespread failure of broadcast television stations to take their obligations under the Act seriously. In INTV’s view that record does not exist. However, if in some fashion the Commission is persuaded that it must do something, it still must select means that are effective in achieving its goals and which impose no costs in excess of the demonstrable benefits of the action. The Commission also must remain within the clear boundaries of its authority under the Act.

With these considerations in mind, INTV flatly opposes adoption of any other definition, rule, guideline, or policy now before the Commission. Congress was ever mindful of the virtues and benefits of maintaining licensee discretion under the Act. Congress’s insights and wisdom must not be lost on the Commission. In particular, INTV opposes adoption of any rule or

¹⁰⁶A more restrictive definition should prompt a lower quantitative threshold.



processing guideline which directly or indirectly *requires* stations to broadcast a minimum amount of educational and informational programming for children. No regulation could more dramatically flout Congressional intent or more certainly lead to counterproductive results. Furthermore, such rules would invite their own demise under constitutional review.

A. Congress Intended the Commission to Afford Television Stations Wide Discretion in Responding to the Needs of the Child Audience.

The Act requires that the Commission consider in its review of television license renewals the extent to which the licensee has served the educational and informational needs of children through its overall programming, including programming specifically designed to serve such needs.¹⁰⁷ The Commission, however, must accord wide discretion to television stations' editorial discretion. As described by the sponsor of the programming provision:

Under this act, the FCC will have the responsibility to weigh broadcaster's efforts at serving the educational and informational needs of children in their community, both in the ordinary and comparative renewal situation. To fulfill the required standards, each licensee must demonstrate that some educational and informational programming targeted specifically at children was provided. Of course, it is expected that the FCC, in evaluating the licensee's compliance with this provision, will defer to the licensee's judgement to determine how to serve the educational and informational needs of children in its community.¹⁰⁸

Senator Inouye, who managed the bill on the Senate floor in his capacity as chairman of the subcommittee on communications, similarly recognized the wide discretion afforded broadcast television licensees under the Act:

We have left the licensee the greatest possible flexibility in how it discharges its public service obligation to children. We recognize that there is a great variety of ways to serve this unique audience -- including programming specially designed to entertain and inform children; family and adult programming that can also contribute to the information needs of children; and cooperative efforts with noncommercial

¹⁰⁷47 U.S.C. §303b(a); *91 R&O* at ¶14.

¹⁰⁸136 CONG. REC. S 10127 (Remarks of Senator Wirth).

stations to produce and present educational fare. The list can be extended as far as the imagination of the creative broadcaster and must rely on the good-faith, dedicated judgment of the broadcaster.¹⁰⁹

Thus, after the bill was passed, Senator Wirth reiterated:

Of greatest import, here, Mr. President, is the programming requirement. Every station must comply. Therefore, each station in a community must offer at least some educational children's programming. No longer will such content be relegated solely to PBS. No longer will commercial broadcasters be able to get out of the responsibility in that way. The nature of the content offered is up to the discretion of the broadcaster. Leeway is granted in deference to broadcasters' first amendment rights, of course, and with the expectation of good-faith judgments....¹¹⁰

Thus, Congress's mandate to the Commission was to accord broadcasters the greatest flexibility in complying with the Act.

The Commission has embraced this mandate expressly, acknowledging "the legislative intent to afford broadcasters maximum flexibility in determining the 'mix' of programming they will present to meet children's special needs."¹¹¹ The Commission similarly has recognized "the open-minded perspective taken in the legislative history, a perspective consistent with allowing sufficient breadth of discretion for licensee creativity and sensitivity to community needs to develop."¹¹²

Congress's disdain for quantitative requirements *vis-a-vis* the children's programming requirement is particularly pertinent in light of the Commission's present consideration of just such a requirement. A quantitative requirement was and is anathema. It is not what Congress intended. Senator Inouye stated unambiguously that:

¹⁰⁹136 CONG. REC. S 10121-22 (1990).

¹¹⁰136 CONG. REC. S 16340 (1990).

¹¹¹91R&O at ¶18.

¹¹²*Id.* at ¶20.



The committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement of children's educational and informational programming that a broadcast licensee must air to pass a license renewal review pursuant to this legislation.¹¹³

Senator Inouye's counterpart in the House of Representatives, Congressman Edward Markey, echoed the view that a quantitative measure clashed with Congressional intent that the Commission examine a licensee's overall service to children:

The legislation does not require the FCC to set quantitative guidelines for educational programming, but instead, requires the Commission to base its decision upon an evaluation of a station's overall service to children.¹¹⁴

Congressman Al Swift, a respected member of the telecommunications subcommittee, also emphasized the general obligation placed on stations in lieu of specific requirements:

The other thing this bill does, importantly, is to suggest that local television stations, when they determine what it is they do to provide service to the community in which they are licensed, consider children as an important audience to which they must respond. It does not dictate specific amounts of time that will be devoted to children's programming; it does not dictate what kinds of programming must be used. It simply says, in making that judgment, which they have to do under the license that they get from the Federal Government, to determine how it is they are going to be dealing with the community in which they serve, how they are going to provide their public service time, that children be one of the audiences seriously considered in providing that programming.

These two things are so elemental, so simple, so fair, so just, so prudent and so necessary that it is difficult to understand why anyone would have any objection.¹¹⁵

¹¹³136 CONG. REC. S 10121 (1990).

¹¹⁴136 CONG. REC. H 8536 (1990).

¹¹⁵136 CONG. REC. H 5246 (1990).



These views, expressed during the debate were, of course, consonant with the committee reports for the bill.¹¹⁶ Thus, Congress never intended the Act to grant the Commission authority to impose a specific quantitative requirement for educational and informational programming for children.

This limitation has not been lost on the Commission. In 1991, it stated:

The Act imposes no quantitative standards and the legislative history suggests that *Congress meant that no minimum amount criterion be imposed*. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement, we believe that the amount of "specifically designed" programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station. We thus decline to establish any minimum programming requirement for licensees for renewal review independent of that established in the Act.¹¹⁷

Thus, proposals that involve quantitative requirements would clash head on with the Act, the underlying Congressional intent, and the Commission's own perception of its mandate under the Act.

They also would constitute a dramatic departure from the long-established scheme of broadcast regulation, including regulation of children's television. As the Commission recognized over 10 years ago:

Commercial broadcasting is guided by both regulatory and commercial requirements. The fundamental commercial nature of the commercial broadcasting system, however, can only be ignored at great risk. It would be possible, as many have suggested, to... respond to existing or regulation created failures of commercial incentives through program quotas, and to respond to general concerns over "quality" through cleverly crafted definitions or ad hoc reviews. The net result,

¹¹⁶See H. R. Rep. No. 385, 101st CONG., 1st Sess. 17 (1989) ("The committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement of children's educational and informational programming that a broadcast licensee must air to pass a license renewal review pursuant to this legislation."); S. Rep. No. 227, 101st CONG., 1st. Sess. 23 (1989).

¹¹⁷1991 R&O at ¶24 [emphasis supplied].